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No. 76-1280

In the Supreme Court of the United States

OCTOBER TERM, 1976

LABORERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, LOCAL NO. 720, PETITIONER

v.

F. RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner challenges the decision of the court of appeals that, at the discovery stage of an enforcement action under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), 73 Stat. 519, as amended, 29 U.S.C. 401 *et seq.*, the Secretary of Labor has a qualified privilege not to reveal the identities and statements of persons who have furnished investigatory information.

On June 8, 1974, petitioner, a labor union, conducted an election of officers which was subject to the provisions of Title IV of the LMRDA. On August 26, 1974, twelve members of the union filed a complaint with the Secretary of Labor protesting the election, pursuant to Section 402(a) of the LMRDA, 29 U.S.C. 482(a) (Pet. App. 8).

The Secretary conducted an investigation of the complaint and, as a result of facts developed through the investigation, found probable cause to believe that violations of the LMRDA had occurred in connection with the election that had not been remedied and that may have affected the outcome of the election. Specifically, the Secretary found that petitioner had provided only one polling place and had failed to provide alternative means (such as absentee balloting) by which members outside the vicinity of petitioner's headquarters could vote. The Secretary also found that petitioner expended union funds raised by dues and similar assessments in order to promote the candidacy of the slate of the incumbent secretary-treasurer (Pet. App. 8-9; R. 19).[1]

The Secretary commenced this enforcement action by filing a complaint seeking a declaration that the election be held null and void and an order directing a new election under the supervision of the Secretary.

Petitioner answered the complaint, and on the same day served a set of written interrogatories upon the Secretary. Five of these interrogatories demanded that the Secretary reveal the "name, address and telephone number" of every person who furnished the Secretary with information during the course of the Secretary's investigation, as well as the "specific nature and content of and substance of" the information that these persons furnished (R. 12-13, 15). The Secretary objected to these five interrogatories, asserting a qualified privilege. Petitioner moved to compel answers to the five interrogatories, and the district court directed the Secretary to answer. The Secretary declined to do so, and the district court dismissed the complaint (Pet. App. 13-14).

[1] "R." refers to Volume III of the original record.

The court of appeals reversed (Pet. App. 7-11), holding that the Secretary has a qualified privilege to withhold the names of confidential informants in LMRDA enforcement actions, and concluded that, in view of the possibility of retaliation against informants if their names were disclosed, the district court's rejection of the claim of privilege here "was an abuse of discretion" (Pet. App. 11).

1. This Court has held that the government has a qualified privilege not to reveal the identities and statements of persons who furnish information of law violations to law enforcement officials. *Roviaro* v. *United States,* 353 U.S. 53. The Court there noted that such a privilege "further[s] and protect[s] * * * the public interest in effective law enforcement." 353 U.S. at 59. The court of appeals correctly held that this privilege is available to the Secretary of Labor in LMRDA enforcement actions. This holding is consistent with the decisions of all courts of appeals that have considered the question of privilege in analogous civil contexts. *E.g., Brennan* v. *Engineered Products, Inc.*, 506 F. 2d 299 (C.A. 8); *Hodgson* v. *Charles Martin Inspectors of Petroleum, Inc.*, 459 F. 2d 303 (C.A. 5); *Westinghouse Electric Corp.* v. *City of Burlington,* 351 F. 2d 762 (C.A. D.C.); *Wirtz* v. *B.A.C. Steel Products, Inc.*, 312 F. 2d 14 (C.A. 4); *Mitchell* v. *Roma,* 265 F. 2d 633 (C.A. 3).

Petitioner contends that a qualified informant's privilege is unnecessary in LMRDA enforcement actions, asserting that there is no danger of retaliation by unions against member-informants (Pet. 4, 5). But "[u]nion reprisal against its members is within the realm of possibility" (Pet. App. 9) and, in any event, "[a]nonymity of informants encourages communications to law enforcement officers" (*id.* at 10). See also *Roviaro* v. *United States, supra,* 353 U.S. at 62.

2. Petitioner errs in contending (Pet. 6) that the decision below treats the privilege as absolute and unlimited. The court of appeals explicitly stated that "[t]he privilege is not absolute but qualified" (Pet. App. 10). It then found that the union's "conclusory and conjectural" (*ibid.*) claim of need for disclosure was not sufficient to overcome this qualified privilege. On the contrary, the court noted that disclosure of the informants is unnecessary because proof of the two alleged violations—inadequate voting facilities and use of union funds to promote a particular candidacy—depends on facts within the union's knowledge (Pet. App. 10-11).

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

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